113-310

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1215.

JOHN THORNLEY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 17, 1884.

SUPREME COURT OF THE UNITED STATES.

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JOHN THORNLEY, APPELLANT,

vs

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 I. *Petition Filed December* 1, 1881.

In the Court of Claims. December Term, 1881.

JOHN THORNLEY
vs.
THE UNITED STATES. } No. 12800.

To the Honorable the Court of Claims of the United States:

The petition of John Thornley respectfully shows to your honors: That he is a citizen of the United States and an officer of the Navy thereof, to wit, a medical director.

That on the first day of September, A. D. 1855, he was commissioned a surgeon in said Navy, and that thereafter, to wit, on the first day of June, 1861, while he still held the grade or rank of surgeon, he was, by an order of the Secretary of the Navy of that date, issued by direction of the President of the United States, placed on the retired list, in accordance with the provisions of section 3 of the act of Congress approved February 21, 1861, (Stats., vol. 12, p. 150,) by reason of incapacity for further service at sea.

Your petitioner further shows that, by the 3rd section of the act of Congress approved July 15, 1870, the sea pay of an officer on the active list of the Navy of the grade or rank held by your petitioner at the time of his retirement was fixed at $3,200 per annum for the second five years from the date of commission.

Your petitioner further shows that section 1 of the act of Congress approved March 3, 1873, (Stats., vol. 17, p. 547,) fixed the pay of officers of the Navy who were then or might there-
2 after be retired on account of incapacity resulting from sickness or exposure in the line of duty at seventy-five per centum of the sea pay of the grade or rank which they held at the time of their retirement.

Your petitioner further shows that the incapacity on account of which he was retired was the result of sickness and exposure in the line of duty; that about the month of April, 1873, and frequently thereafter, he requested the Secretary of the Navy to declare the origin of the incapacity for which he was retired as aforesaid; that on the first day of January, 1879, the Secretary of the Navy declared that the incapacity for which your petitioner was retired had its origin in the line of duty, and directed the name of your petitioner to be borne upon the records of the Navy Department, in accordance with said declaration; that on the 8th day of January, 1879, the Secretary of the Navy notified the Fourth Auditor of the Treasury of the fact so declared by him; and that since the 1st day of January, 1879, aforesaid, the name of your petitioner has appeared in the Navy Register as that of an officer entitled to the benefits of said act of Congress approved March 3, 1873.

Your petitioner further shows that since March 3, 1873, he has only been allowed by the accounting officers of the Treasury and has only received pay at the following rates, to wit: From March 3, 1873, to July 1, 1875, $2,100 per annum; from July 1, 1875, to

November 28, 1881, $1,600 per annum; whereas your petitioner says that under the acts of Congress and the order of the Secretary of the Navy, hereinbefore recited, he was entitled to receive pay at the rate of $2,400 per annum.

Wherefore your petitioner prays judgment for the difference between the pay which he has received and the pay to which he was entitled as aforesaid, together with such other sum as may become due your petitioner up to and including the date of the finding of this Honorable Court, to wit, in the sum of $6,000.00.

Your petitioner further shows that he is the sole owner of this claim, and has never assigned or disposed of it, or any part of it, to any person; that he is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that he has at all times borne true allegiance to the Gov-
3 ernment of the United States, and has never in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and that he has appointed John Paul Jones, of 1420 New York avenue, Washington, D. C., his attorney for the prosecution of this claim.

JOHN THORNLEY.

John Thornley, being first duly sworn according to law, on oath says that he is the identical John Thornley who signed the foregoing petition, and that the matters and things therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me, this 30th day of November, 1881.

[SEAL.] E. D. F. BRADY,
United States Commissioner in and for the District of Columbia.

II. *Traverse. Filed December* 19, 1881.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way volun-
4 tarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such cases provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Attorney General.

III. *Amended Petition. Filed by Leave of Court November* 16, 1882.

To the Honorable the Court of Claims of the United States:

The petition of John Thornley respectfully shows to your honors:

That he is a citizen of the United States and an officer of the Navy thereof, to wit, a medical director.

That on the first day of September, 1855, he was commissioned a

surgeon in said Navy, and that thereafter, to wit, on the first day of June, 1861, while he still held the grade or rank of surgeon, he was, by an order of the Secretary of the Navy of that date, issued by direction of the President of the United States, placed on the retired list, in accordance with the provisions of sec. 3 of the act of Congress approved February 21, 1861, (Statutes, vol. 12, p. 150,) by reason of incapacity for further service at sea, but that for some years after such retirement he was assigned to and performed active duty.

Your petitioner further shows that by the 3d section of the act of Congress approved July 15, 1870, and subsequently by section 1556 of the Revised Statutes, the sea pay of an officer on the active list of the Navy of the grade or rank held by your petitioner at the time of his retirement, was fixed as follows, to wit:

For the first five (5) years from date of commission, $2,800 per annum.

For the second five (5) years from date of commission, $3,200 per annum.

For the third five (5) years from date of commission, $3,500 per annum.

For the fourth five (5) years from date of commission, $3,700 per annum.

After twenty (20) years from date of commission, $4,200 per annum.

Your petitioner further shows that section 1 of the act of Congress approved March 3d, 1873, (Statutes, vol. 17, p. 547,) re-enacted in section 1588 of the Revised Statutes, fixed the pay of officers of the Navy who were then or might thereafter be retired on account of incapacity resulting from sickness or exposure in the line of duty at seventy-five (75) per centum of the sea pay of the grade or rank which they held at the time of their retirement.

Your petitioner further shows that the act of Congress approved April 7, 1882, (Statutes 1881 and '82, p. 41,) entitled "An act for the relief of Medical Director John Thornley, United States Navy," directed that your petitioner be considered as having been retired from active service as a surgeon and placed on the retired list of officers of the Navy June 1st, 1861, on account of physical incapacity originating in the line of duty, and that he be paid accordingly.

Your petitioner further shows that section one (1) of the act of Congress approved August 5th, 1882, provided that all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both.

Your petitioner claims that, under a proper construction of said acts, he should have received pay since March 3, 1873, at the following rates, to wit: From March 3d, 1873, to Sept. 1st, 1875, $2,775 per annum, or seventy-five (75) per centum of the sea pay of a surgeon in his fourth five (5) years from date of commission. From September 1st, 1875, to date of filing of this amended petition, $3,150 per annum, or seventy-five (75) per centum of the sea pay of a surgeon after twenty years from date of commission.

But that such pay has been wrongfully and unlawfully withheld from him, and that he has only received pay for the whole of said time since said 3d day of March, 1873, at the rate of $2,400 per annum.

Wherefore your petitioner prays judgment in the sum of $6,343.67.

Your petitioner further shows that he is the sole owner of this claim, and has never assigned or disposed of it, or any part of it, to any person; that he is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; and that he has at all times borne true allegiance to the Government of the United States, and has never in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Your petitioner has appointed John Paul Jones, of 1420 N. Y. avenue, Washington, D. C., his attorney for the prosecution of this claim.

JOHN THORNLEY,
By his Attorney, JOHN PAUL JONES.

DISTRICT OF COLUMBIA, *ss:*

John Paul Jones, being first duly sworn according to law, on oath says: That he is the attorney of the petitioner named in the foregoing amended petition, and that the matters and things therein stated are true to the best of his knowledge and belief.

JOHN PAUL JONES.

Sworn and subscribed to before me, this 16th day of November, A. D. 1882.

JOHN E. BEALL,
A Commissioner of the U. S. Court of Claims in the District of Columbia.

7 IV. *Traverse of Amended Petition. Filed November* 20, 1882.

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said amended petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Att'y General.

8 V. *Findings of Fact and Conclusion of Law. Filed January* 29, 1883.

This case having been heard before the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

I.

On the 3d of September, 1855, the claimant was commissioned a surgeon in the Navy.

II.

On the 1st of June, 1861, on account of physical incapacity to perform further service at sea, he was placed on the retired list as a surgeon under the 3d section of the act of February 21, 1861. (12 Stat. L., 147, 150, ch. 49.)

III.

From March 3, 1873, to November 16, 1882, he has been paid at the rate of $2,400 per annum; but the accounting officers of the Treasury have refused to allow him any more than that amount.

Upon the foregoing facts the conclusion of law is that the claimant is not entitled to recover, on the grounds stated in the following opinion:

VI. *Opinion of the Court.*

DRAKE, Ch. J., delivered the opinion of the Court.

In section 1 of the act of March 3, 1873, (17 Stat. L., 547, ch. 230,) the following provision was adopted:

Those officers on the retired list, and those hereafter retired, who were, or who may be, retired after forty years' service, or on attaining the age of sixty-two years, in conformity with section one of the act of December, eighteen hundred and sixty-one, and its amendments, dated June twenty-fifth, eighteen hundred and sixty-four, or those who were or may be retired from incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, shall, after the passage of this act, be entitled to seventy-five per centum of the present sea pay of the grade or rank which they held at the time of their retirement.

With a slight change of words, but not of meaning, this is now embodied in section 1588 of the Revised Statutes.

By its terms the claimant was not entitled to the seventy-five per cent. rate of pay, for the physical incapacity to perform further service at sea, on account of which he had been retired, had not been found to have resulted from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein.

Congress, however, passed, April 7, 1882, an act for his relief (22 Stat. L., 41, ch. 72), as follows:

That Medical Director John Thornley, United States Navy, be

considered as having been retired from active service as a
9 surgeon and placed on the retired list of officers of the Navy June first, eighteen hundred and sixty-one, on account of physical incapacity originating in the line of duty, and that the accounting officers of the Treasury be, and they are hereby, authorized and directed to allow him the rate of retired pay of the grade in which he was retired, prescribed by section fifteen hundred and eighty-eight Revised Statutes, for officers so retired; and the said accounting officers are hereby further authorized and directed, in adjusting the account of said John Thornley, to allow and pay to him the difference between the pay he has been allowed as a surgeon on the retired list since the passage of the act approved March third, eighteen hundred and seventy-three (section fifteen hundred and eighty-eight Revised Statutes), and that to which he is entitled under that act as having been retired as a surgeon for incapacity originating in the line of duty, said sum to be paid out of any money in the Treasury not otherwise appropriated.

The chief mandate of this act and that which affects the present case is that the claimant shall be allowed the rate of retired pay of the grade in which he was retired, prescribed by section 1588 of the Revised Statutes, for officers retired on account of physical incapacity originating in the line of duty. That rate of pay is seventy-five per centum of the sea pay of the grade or rank which he held at the time of his retirement, as that sea pay existed March 3, 1873, and has since existed.

By the act of July 15, 1870, (16 Stat. L., 321, 331, ch. 295), and by section 1556 of the Revised Statutes, the highest pay of surgeons in the navy, *i. e.*, their sea pay, was fixed as follows:

1. During the first five years after date of commission, $2,800;
2. During the second five years from such date, $3,200;
3. During the third five years from such date, $3,500;
4. During the fourth five years from such date, $3,700; and
5. After twenty years from such date, $4,200.

The claimant having been retired during the second five years after date of commission, the act for his relief entitled him at least to seventy-five per cent. of the sea pay of a surgeon in that period of his service. This amount he has received for the whole period from March 3, 1873, to the time when this suit was brought.

He therefore has no claim unless he is entitled to longevity pay; that is, the increase of pay which takes place at the end of fixed periods of service in the same grade. At the trial the claimant relied mainly on the recent case of Tyler *vs.* The United States (16 C. Cls., 223, and 105 U. S. R., 244) in support of his right to this pay, but that was a case of an Army officer, and the statute governing it is so different in terms from that involved in this case that we do not consider that decision applicable here.

The officers of the Navy are divided into two classes—those on the active list who perform all the duties, bear all the responsibilities, and suffer all the privations attendant on the naval service at sea or

on shore, at home or abroad, in peace or in war, and therefore have higher pay and greater privileges; and those on the retired list who have no responsibilities, can have no duties assigned them except in time of war and have no privations except enforced inaction and reduced pay. Among the privileges of the former is this longevity pay. From the formation of the Navy till 1835 it had no existence, and was then authorized only as to surgeons. (4 Stat. L., 755, ch. 27.)

Down to 1860 it was not allowed to other officers. Men grew old as lieutenants, with no increase of pay from the day they became such till they reached the period of promotion to a higher grade. In that year the longevity pay was extended to captains, commanders, lieutenants, engineers, boatswains, gunners, carpenters, and sailmakers (12 Stat. L., 23, ch. 67), and in 1870 to all grades of officers on the active list except midshipmen (16 Stat. L., 321, ch. 295), and so it remains to this day.

10 There was, no doubt, an underlying principle and purpose in the introduction of longevity pay into the Navy. We think it was intended, first, to induce men to enter the Navy and remain in it for life; second, to remove the depressing influence of long periods of service in one grade without an increase of pay; third, to compensate for increased professional knowledge and efficiency in officers by increasing their pay in advance of promotion. If these views are correct, the whole basis of longevity pay is the officer's capacity for duty and his performance of it. In other words, longevity pay is for longevity in actual service. Upon these grounds alone we should consider that longevity pay ought to be confined to officers on the active list. But it is, in fact, so confined by the very terms of the statute. When it is in words given to officers on that list, it is a clear case for the application of the familiar maxim *expressio unius est exclusio alterius;* and we have no right to resort to presumptions or constructions to extend its benefits to another class of officers, who, whether justly or not, have been withdrawn from the active and placed on the retired list, and forbidden to be employed on any duty in time of peace. To increase their pay every five years would involve the incongruity of creating a longevity pay for longevity in doing nothing. In our opinion there is no foundation for the claim that retired officers in the Navy are entitled to longevity pay.

This disposes of claimant's case. He does not claim that up to the time of his retirement he was entitled to any higher rate of pay than that allowed to a surgeon on the active list, in the second five years after date of commission, $3,200; and he admits that since March 3, 1873, he has been paid seventy-five per cent. of that rate. He is entitled to that and no more; and his petition must be dismissed.

VII. *Final Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 29th day of January, A. D. 1883, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, John Thornley, be dismissed.

11 VIII. *Application for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the 29th day of January, 1883, in favor of the defendants, the claimant, by his attorney, averring that the amount in controversy exceeds three thousand dollars, on this 27th day of April, 1883, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

JOHN PAUL JONES,
Attorney of Record.

Filed April 27, 1883.

And now, to wit, June 8th, 1883, the application of claimant for allowance of appeal, filed April 27, 1883, is allowed as prayed for.

12 In the Court of Claims.

JOHN THORNLEY
vs.
THE UNITED STATES. } No. 12800.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court, and the conclusion of law thereon, of the opinion of the Court, of the final judgment of the Court, of the application of claimant for allowance of appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this fifteenth day of June, A. D. 1883.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 1215. John Thornley, appellant, *vs.* The United States. Filed November 17, 1884.

113-310

Office Supreme Court U. S.
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JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the U. S.

No. 1215

JOHN THORNLEY vs. THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

JOHN PAUL JONES,
ROBERT B. LINES,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 1215

JOHN THORNLEY *vs.* THE UNITED STATES.

Appeal from the Court of Claims.

STATEMENT OF CASE.

The appellant entered the Navy as Assistant Surgeon October 13, 1840; was commissioned a Surgeon September 1, 1855, and was placed on the retired list June 1, 1861, under Section 3 of the Act of Congress of February 21, 1861, (12 Stats., 150,) on account of incapacity for further service *at sea*. By the terms of that act he was given the leave of absence pay of *his grade*, as it existed prior to Act of June 1, 1860. By Section 1 of the Act of March 3, 1835, (4 Stats., 755,) the leave pay of a Surgeon was fixed as follows: For the first five years after the date of his commission, $1,000; for the second five years, $1,200; for the third five years, $1,400; for the fourth five years, $1,600; after twenty years, $1,800. But Section 7 of the Act of August 3, 1848, (9 Stats., 271,) directed the periods governing a Surgeon's pay to be computed from the date of his entry into the service instead of from the date of his commission as Surgeon. Upon his retirement, therefore, the appellant became entitled to the leave of absence pay of a Surgeon of over twenty years' standing, or $1,800 per annum.

The whole naval pay-table was changed and the rates largely advanced by Act of July 15, 1870, by Section 3 of which the pay of Surgeons, on the active list, was fixed as follows, (16 Stats., 331, now Sec. 1556, R. S.): For the first five years after the date of commission, at sea, $2,800, on shore duty, $2,400, on leave or waiting orders, $2,000; for the second five years, at sea, $3,200, on shore duty, $2,800, on leave or waiting orders, $2,400; for the third five years, at sea, $3,500, on shore duty, $3,200, on leave or waiting orders, $2,600; for the fourth five years, at sea, $3,700, on shore duty, $3,600, on leave or waiting orders, $2,800; after twenty years, at sea, $4,200, on shore duty, $4,000, on leave or waiting orders, $3,000.

By Section 5, of the same act, the pay of all retired officers, *when not on active duty*, was made "equal to one half of the *highest* pay prescribed by this act for officers on the active list, whose grade corresponds to the grade held by such retired officers, respectively, at the time of their retirement." Claimant's retired pay was thus advanced to $2,100 per annum.

Under authority of Sec. 4 of the Act of January 16, 1857, (11 Stats., 154,) and Sec. 9 of the Act of March 2, 1867, (14 Stats., 517,) appellant was, on March 3, 1871, promoted to be a Medical Director on the retired list, but by the provisions of those acts, as well as by the act of 1870, he was prohibited from receiving any increased pay *in consequence of such promotion.*

All this time it had been lawful to assign retired officers to active duty, and when so assigned to pay them active duty pay. (Sec. 2, Act of February 28, 1855, 10 Stats., 617; Sec. 5, Act of June 1, 1860, 12 Stats., 27; Sec. 25, Act of August 3, 1861, 12 Stats., 291; and Sec. 5, of the Act of 1870, just quoted.)

But by Sec. 1 of the Act approved March 3, 1873, (17 Stats., 547,) it was enacted:

"That no officer on the retired list of the Navy shall be employed on active duty except in time of war: *Provided*, That those officers on the retired list, and those hereafter retired, who were or who may be retired after forty years' service, or on attaining the age of sixty-two years, in conformity with Section one of the Act of December, 1861, and its amendments, dated June 25, 1864, or those who were or may be retired from incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, shall, after the passage of this act, be entitled to seventy-five *per centum* of *the present sea-pay of the grade or rank which they held at the time of their retirement.*"

This cut appellant off from all chance of active duty, but entitled him to an increase of retired pay, provided he could show (what he was not required to show by the Act of February 21, 1861, under which he was retired) that his incapacity for service at sea resulted "from long and faithful service, from wounds or injuries received in the line of duty or from sickness or exposure therein." Steps to that end were taken, and Congress finally passed a private act, approved April 7, 1882, (22 Stats., 41,) directing that he "be considered as having been retired from active service *as a Surgeon*, and placed on the retired list of officers of the Navy, June 1, 1861, on account of physical incapacity, originating in the line of duty." The act required the accounting officers to pay appellant from March 3, 1873, the difference between the pay to which he was entitled under the act of that date and that which he had received, and also "the retired pay of the grade in which he was retired, prescribed by Sec. 1588 Revised Statutes," (which is copied from the Act of March 3, 1873, so far as it affects this case.)

In construing this act, the accounting officers paid the appellant from March 3, 1873, at the rate of only $2,400

per annum, or seventy-five *per centum* of the sea-pay of a surgeon *in his second five years after date of his commission*, which they held to be the "*grade or rank* which he held at the time of his retirement," according to the meaning of the act of 1873, Sec. 1588 R. S., and the private act of April 7, 1882. In the court below, the claimant contended that this ruling was erroneous, and advanced the following propositions:

1. That the words "grade or rank" in the act of 1873, and Sec. 1588, R. S., and "grade" in the special act of April 7, 1882, signified merely title or office, (in appellant's case "surgeon,") without reference to the lustrum or period of service in such office, in which he might happen to be at date of retirement; the pay being calculated on the office, grade or rank held at the time of retirement in consequence of the provision of the acts above referred to allowing promotion, after retirement, from such office, grade or rank to a higher office, grade or rank (in appellant's case Medical Director), but prohibiting increase of pay by reason of such promotion.

2. That the words "the sea pay" in those acts referred to the whole graduated scale of sea pay fixed by Sec. 3 of the Act of July 15, 1870, R. S., Sec. 1556, and that therefore appellant's retired pay, for any period of five years from the date of his commission, must be computed at three-fourths of the sea-pay of a surgeon for such period. This computation would give appellant, from March 3, 1873, to September 1, 1875, three-fourths of the sea-pay of a surgeon in his fourth five years from date of commission, or $2,775 per annum; and, after September 1, 1875, three-fourths of the sea-pay of a surgeon twenty years from such date, or $3,150 per annum.

3. As an alternative construction, it was claimed that if the words "*the* sea-pay" in the act of 1873, and Sec. 1588

R. S., referred to only one of the rates of sea-pay fixed by the act of 1870 and Sec. 1556 R. S., (the words "grade or rank" meaning merely Surgeon,) then, that those words were ambiguous as not designating the rate, and that reference to the history of the act of 1873 would show that the *highest* rate of sea-pay was the rate meant to be referred to, and that appellant was entitled to three-fourths of $4,200, or $3,150, from March 3, 1873.

Again, conceding that the words "grade or rank," in the act of 1873 and Sec. 1588 R. S., were used to indicate *lustrum* of service as well as title or office, it was contended as a distinct ground of claim:

4. That the "grade or rank" held by appellant at the time of retirement was, under the act of August 3, 1848, (*supra*,) that of a surgeon of twenty years standing, and that the act of 1873, and Sec. 1588 R. S., gave him three-fourths of the present sea-pay of such a surgeon, viz: $3,150 per annum from March 3, 1873.

The third and fourth propositions were raised in argument below, but not on the face of the petitions, (of which the amended petition is the one relied on.) They were not noticed at all in the opinion of the lower court, but this court is asked to consider them and, in support of proposition No. 4, to take judicial notice of the Naval Register for January, 1883, pp. 124, 125, showing appellant to have entered the service October 13, 1840. Page 125 also shows his promotion since retirement.

The first and second propositions were overruled in this case, and more specifically in the case of *Rutherford* vs. *The United States*, which was tried in order to get a more definite ruling, ~~and the appeal in which is submitted along with this case.~~ In Rutherford's case, the third proposition was advanced as the leading one, and definitely overruled on the same ground as the second, viz: that "grade or

rank" meant the lustrum of service as well as the office in which appellant was retired.

The court is asked to consider that opinion with the one in this case, ~~it being more convenient to assemble the points involved in both cases (which are really the same, except as to the proposition numbered 4) in one brief.~~ The assignment of errors is framed as though all the points actually decided were expressly mentioned in the opinion in the Thornley case.

Assignment of Errors.

The court below erred—

1. In holding that "grade or rank," as used in the act of 1873, and section 1,588 R. S., and "grade" as used in the private act of April 7, 1882, refer to the lustrum or period of service under his commission as surgeon, in which appellant stood when retired as well as to the title or office expressed by the commission.

2. In holding that longevity increase of pay is confined to the active list of the Navy by the words of sec. 3 of the act of July 15, 1870, R. S. 1,556.

3. In holding that such increase is confined to the active list by the policy of the law.

4. In holding that the "grade or rank" held by appellant "at the time of his retirement" was the grade or rank of a surgeon in his second five years.

5. In holding that "sea pay of the grade or rank held at the time of retirement" is equivalent to "sea pay at the time of retirement."

6. In dismissing the petition.

Argument for Appellant.

The second and third propositions cited in the statement

of the case are alternatives, both depending on the soundness of the first proposition. If that is unsound, as decided below, then Nos. 2 and 3 fail. If proposition No. 1 is sound, then on either No. 2 or No. 3 this is a test case involving the interests of some fifty officers of the Navy, retired under various acts of Congress. It does not affect the line officers retired in grades above that of Lieutenant Commander, which have no graduated pay, (R. S., sec. 1,556), nor officers of the line or staff in grades having graduated pay, who were retired after reaching the highest pay of such grades.

Proposition No. 4 affects the appellant and one or two medical officers retired under act of February 21, 1861. In order to get a case large enough to appeal it was necessary to take one whose equities may not be so readily apparent as would be those of some other case, but that can make no difference in this court. Nor will the court be prevented from giving judgment on either the 3d or the 4th proposition, by the fact that they are not set forth in the petition. (*Clark* vs. *U. S.*, 5 Otto., 539.)

I.

The court below erred in holding that "grade or rank," as used in the act of 1873 and sec. 1,588 R. S., mean *lustrum* or "pay grade," as well as title or office.

We conceive that this error will be demonstrated, and the propositions submitted to the lower court, which are numbered 1 and 2 in the foregoing statement of the case, sustained by the opinion of this court delivered by Mr. Justice Miller in *United States* vs. *Tyler* (105 U. S., 244), and the opinion of the Court of Claims which it affirmed, viz.: in *Tyler* vs. *United States* (16 C. Cl's, 223).

In the brief in that case, submitted to this court by the Solicitor-General (page 7), it was conceded that "if the con-

struction hitherto practiced by the Department" (not to allow retired officers longevity increase of pay) "is erroneous, there is not an officer of five years' service in the Army, Navy, or Marine Corps, or a professor of the two academies, who has not been adversely affected thereby, and who cannot obtain a judgment, accordingly as has this claimant."

That case depended on the construction of the following sections of the Revised Statutes:

"SEC. 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations.

* * * *

"Captain, not mounted, eighteen hundred dollars a year.

"SEC. 1262. There shall be allowed and paid to each commissioned officer below the *rank* of Brigadier-General, including chaplains and others having assimilated rank or pay, ten percentum of their current yearly pay for each period of five years' service.

"SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the *rank* upon which they were retired."

It was contended by the defendants in that case that the words "rank upon which they were retired," in sec. 1274, signified both office and *lustrum* of service, just as it was contended below (and that was the real point at issue, although it is obscured by the opinion in this case), that "grade or rank held at the time of retirement" in the act of 1873 and sec. 1588, R. S., meant both office and lustrum of service. If that were the true construction, then this court should have reversed the decision of the Court of Claims in Tyler's case, for on well-known principles the specific provision of sec. 1274 would have limited the general words of sec. 1262, "each commissioned officer," &c., and taken retired officers out of the class for whom longevity pay was provided.

*Sec. 1263 says "grade of Brigadier General"

Pennington vs. *Coxe*, 2 Cranch, 52, 53;
Commonwealth vs. *Montrose*, 52 Penna. State, 391;
Hawkins vs. *Gathercote*, 6 De G. M. & G. 1,

But the court held that they were not so excepted, and thus necessarily (though not expressly) decided that the rank on which Tyler was retired was the rank of Captain only, and that "seventy-five per centum of the pay" of that rank was seventy-five per centum of the whole graduated scale of the pay of a Captain under secs. 1261 and 1262. To hold that it was seventy-five percentum of this rank *for the lustrum* in which he was retired was, to use the words of the opinion, "to add a further limitation not found in any statute."

The reason for calculating a retired officer's pay on the rank held at retirement was not so apparent in Tyler's case as it is here, since Tyler was not promoted after retirement. But that opinion was sufficient to decide this case, as the Solicitor-General clearly foresaw. The fact that in the Navy the periodical longevity increase is ascertained by fixed sums instead of by a *per centum* on current yearly pay, as in the Army, does not alter the principle. Nor does the fact that in the Navy it is computed in each grade or rank from the date of commission to that grade or rank, instead of from entry into the service, as in the Army, alter the principle, although the latter fact puts Navy officers at a disadvantage with those of equal rank in the Army.

Thus, a Surgeon in the Navy under sec 1474 R.S., ranks with a Lieutenant Commander, and the latter, under sec. 1466, ranks with a Major in the Army. All three may be supposed to have served fifteen years before reaching their respective ranks. But under sections 1261 and 1262 the Major on reaching that rank comes at once into the pay of his fourth five years, to wit., $2,500, plus ten per centum for each five years' service, or $3,327.50 per annum, whether

on duty or not; while the Lieutenant Commander and Surgeon, with the same length of service, get at first, under sec. 1566, only $2,800 at sea, $2,400 on shore duty, and $2,000 on leave. To reach the pay of the Major, even while at sea, the Surgeon must serve ten years longer on the active list in his new grade; to reach it for shore duty, he must serve fifteen years; and he never will get it while on leave, if he serves twenty years. The Lieutenant Commander's pay, while in that grade, never will equal that of the Major. He must be promoted to a Commander to get $3,500 at sea, to a Captain to receive that amount on shore duty, and to a Rear-Admiral before he can get it while on leave. Surely there is disparity enough between the pay of Army and Navy officers on the active list.

But by the construction of the accounting officers, and the decision of the court below, a further disparity is introduced. Suppose the Major and the Surgeon to be retired each in his 16th year of service, but first year after date of commission; the former will receive at the outset three-quarters of $3,327.50 or about $2,500, and at the end of another five years, will, under the decision in Tyler's case, receive an additional ten per centum. The latter will receive three-quarters of $2,800 or $2,100 at the outset, and at the end of another five years, will, under the decision of the court below, get no increase whatever. And this unfair discrimination can only result from a strained reading of the navy statutes by which "grade or rank held at the time of retirement" are construed to mean *lustrum*, "pay grade" or "pay rank," while the words "rank upon which they were retired" in the army statutes are left to their natural meaning.

If there is one thing in the act of 1873 that is perfectly apparent on its face, it is that it was intended to increase the pay of *all* officers retired for injuries in the line of duty

and for similar meritorious causes. This increase was to be both absolute, to compensate those officers for being deprived of the chance of active duty, and relative, to distinguish them from officers of the same grade retired for less meritorious causes, such as, for instance, failure to pass examination for promotion under section 4, of the act of April 21, 1864, (13 Stats., 53.) Now let us see how the construction of the act of 1873 by the accounting officers and the court below, may defeat this double intent.

Take the case of a surgeon, retired in 1872, for incident of service, in his first five years after date of commission as surgeon. Under Sec. 5 of the act of July 15, 1870, (statement of case *supra*,) such an officer received $2,100 per annum, that being "half the highest pay" prescribed by that act for a surgeon (see opinion in Rutherford *vs.* U. S.) Under the act of 1873, which was meant to advance his pay, he would never receive, according to the accounting officers and the court below, any more than that amount, that being three-quarters of "the present sea pay" of a surgeon in his first five years. And so, under the acts of 1870 and 1873, the pay of a surgeon retired in his first five years for causes incident to the service would always be the same as that of a surgeon retired for causes not so incident.

If the construction of the accounting officers and of the court below will not give the benefits of the act of 1873 to all the officers expressly provided for in that act, and any other construction will, then such other construction is, on well-known principles, to be preferred.

Upon kindred principles, if the construction of the accounting officers and of the court below is incapable of logical application to all the officers provided for in the act, and any other construction can be applied to all those officers, then such other construction is to be preferred.

To illustrate this point, let us briefly examine the legisla-

tion providing graduated pay for officers of the Navy, which, by the way, is quite inaccurately stated in the opinion of the court below in this case.

Longevity pay was first provided for Assistant Surgeons by section 3 of the act of May 24, 1828, (4 Stats., 313;) for Surgeons by act of March 3, 1835, (*Ib.*, 755;) for Chief Engineers by act of March 3, 1849, (9 Stats., 378;) boatswains, gunners, carpenters, and sailmakers by act of August 5, 1854, (10 Stats., 587.) By the act of June 1, 1860, (12 Stats., 23–27,) it was given to Commanders, Lieutenants, Chaplains, and Pursers, (or Paymasters, as they are now called,) but, by the act of July 16, 1862, (*Ib.*, 586,) it was taken away from Commanders and Lieutenants, who were given a fixed pay, without reference to length of service, and, consequently, from Chaplains, who, by the act of 1860, were to be paid as Lieutenants. Assistant Paymasters received it by the act of July 17, 1861. (*Ib.*, 258.)

Now, we find that by section 3 of the act of July 15, 1870, (R. S., 1556,) longevity pay was restored to Lieutenants and Chaplains, and given for the first time to Lieutenant-Commanders, Masters, Ensigns, Passed-Assistant Surgeons, Passed-Assistant Paymasters, First-Assistant Engineers, Second-Assistant Engineers, Naval Constructors, Assistant Naval Constructors, Professors of Mathematics, and Civil Engineers. Thus, in 1869, there were nine grades which had longevity pay, and thirteen which had not, but which were given it by the act of 1870.

Suppose an officer of one of the thirteen grades, say a Lieutenant, to have been retired in 1869 for physical disability incident to the service. Under the act of March 3, 1873, (R. S., 1588,) he would be entitled to seventy-five per centum of the present sea pay of the "grade or rank which he held at the time of his retirement."

What was that "grade or rank?" It could only be the

"grade or rank" of Lieutenant, because, when the officer was retired the grade of Lieutenant had no pay *lustra*. A Lieutenant received as much pay the first year after date of his commission, as he did the tenth year. There was no such thing as a "grade or rank" of "Lieutenant in his first five years," or "Lieutenant in his second five years." The construction of the accounting officers could not, with any logic, be applied to such a case. What is the true solution of the difficulty?

It must be presumed that the act of 1873 was drawn with careful reference to the changes made in the pay table by the act of 1870. It was known that by that act *lustra* for pay had been created in grades in which they had not before existed. It was also known that in most cases a large advance had been made over the annual rates of pay existing before the act of 1870.

The following pay tables will illustrate both points:

Before July 1, 1870, act July 16, 1862, (12 Stats., 586:)

Rear Admirals	$5,000
Commodores	4,000
Captains	3,500
Commanders	2,800
Lieutenant-Commanders	2,343
Lieutenants	1,875
Masters	1,500
Ensigns	1,200
Midshipmen	500

After July 1, 1870, act July 15, 1870:

	$6,000
	5,000
	4,500
	3,500

	1st 5 years.	After 5 years.
	$2,800	$3,000
	2,400	2,600
	1,800	2,000
	1,200	1,400
	1,000	

Act June 1, 1860, (12 Stats., 25, 27.)

	1st 5 y'rs,	2d,	3d,	4th,	After 20 y'rs.
Surgeons	$2,200,	$2,400,	$2,600,	$2,800,	$3,000
Paymasters	2,000,	2,400,	2,600,	2,900,	3,100,
Chief Engineers	1,800,	2,200,	2,450, After 15 y'rs,	2,600	
P. A. Surgeons					1,500
P. A. Engineers					1,250
Ass't Surgeons					1,250
Ass't Engineers					1,000

	1st 5 y'rs,	2d,	3d,	4th,	After 20 y'rs.
Surgeons	$2,800,	$3,200	$3,500,	$3,700,	$4,200
Paymasters	"	"	"	"	"
Chief Engineers	"	"	"	"	"

	1st 5 y'rs,	After 5 y'rs,
P. A. Surgeons	$2,000,	$2,200,
P. A. Engineers	"	"
Ass't Surgeons	1,700,	1,900,
Ass't Engineers	"	"

The act of 1873 proposed to give officers retired before July 1, 1870, the benefit of the advanced pay provided by the act of 1870. It therefore gave them seventy-five per centum of "the present sea pay of the grade or rank which they held at the time of their retirement." Suppose a Lieutenant commisioned in 1865 and retired in 1869 for injuries in the line of duty? The act of 1873 gave him three-quarters the present sea pay of a Lieutenant. The present sea pay of a Lieutenant depends on the date of his commission. Finding his commission dated in 1865, and the date not affected by the retirement, the accounting officers should have given him three-quarters of the present sea pay of a Lieutenant in his second five years. They should have adopted the rule laid down by the Court of Claims in *Tyler* vs. *The United States*, (16 Ct. Cls., 223,) "that the pay of a retired officer is to be determined by first ascertaining what would have been his pay had he not been retired, and then allowing him seventy-five per cent of that sum."

That rule is prescribed in plain terms for the least meritorious class of retired officers of the Navy by Sec. 1593 R. S., as follows:

"Officers placed on the retired list on furlough pay, *shall receive only one-half of the pay to which they would have been entitled if on leave of absence* on the active list." Sec. 1557 prescribes the pay of officers on furlough on the active list under that section by saying that they "*shall receive only one-half of the pay to which they would have been entitled if on leave of absence.*" Now, nobody ever thought of denying that the pay of a surgeon, for instance, on the active list, increased at the end of his first five years from date of commission, simply because he happened, at the time to be on furlough instead of on duty or leave of absence. But in dealing with Sec. 1593 R. S., the accounting officers gave it an entirely different construction

from that given to exactly the same words in Sec. 1557, and denied longevity increase to the retired officer, while granting it to the active officer. Having denied the longevity increase to the retired officer on three-fourths pay by their erroneous construction of the act of 1873 and Sec. 1588 R. S., they felt obliged to deny it to the less meritorious officer retired on furlough pay.

And so the Court of Claims, having ruled against Thornley and Rutherford, thought it consistent, *because of such ruling alone*, to deny longevity increase to an officer retired on furlough pay. (*Brown* vs. *U. S.*, 18 C. Cls., 537.)

Let us examine the decision of the court below from another and very important point of view. As before stated, up to 1873, the president could employ any retired officer on active duty, and he may still do so in time of war. Suppose two surgeons, both commissioned March 1, 1856, and both retired February 27, 1861, in their first five years, under the act of February 21, 1861, as incapacitated for further service at sea by causes incident to the service. Suppose one to have been at once put on active duty on shore, and to have served continuously, receiving active duty pay, longevity included, until the act of March 3, 1873, prohibited his further employment. Under the present construction of that act, his pay was at once reduced from $3,600, the shore-pay of a surgeon in his fourth five years, to $2,100, or three-fourths of sea-pay of a surgeon in his first five years, although he had served actually for seventeen years.

The other surgeon, we will suppose, was not assigned to active duty, but devoted himself to his private practice, in which he has become eminent. A war breaking out, he is now assigned to the charge of a hospital. His commission was dated in 1856, and has grown just as old during his retirement as if he had been in active service. He receives,

therefore, $4,000, the shore-pay of a surgeon after tweuty years from such date, or twice as much as his brother officer of the same date on the retired list, who has seen twelve years more active service, will receive under a law which gives him three-fourths of the pay of his grade.

In both cases time passed on the retired list must be counted in computing pay under the positive provisions of the laws which give active pay to an officer on active duty. That cannot be avoided by any construction of "grade or rank." But, under the decision of the court below, one officer would lose the benefit of twelve years' active service as soon as he was deprived of active duty, while the other would receive the benefit of twenty-two years "longevity in doing nothing," as soon as he was called into active service. Time on the retired list may be counted for active duty pay, but time on active duty cannot be counted for retired pay.

Such are some of the incongruities which the practice of the accounting officers and the decision of the court below would interject into the Navy laws. The cases supposed are not imaginary. The questions involved in them might be brought before this court but for the limitation as to amount in appealed cases.

In defining "grade or rank" in Rutherford's case to mean "pay grade or lustrum," the court below base their argument largely on two points: first, that the word "grade" is not always used to designate title or office, but sometimes denotes a sub-division of officers holding the same title or office; and second, that it is not used at all to denote the title or office of Chief Engineer. If it were, they intimate that claimant's construction might be adopted. On the first point they cite Section 1390 Revised Statutes, dividing Chief Engineers into "three grades, by relative rank." That is the only instance in the navy laws where the word

"grade" is applied to anything but title or office. Let us see how this crept into the law.

The marginal notes to section 1390, refer us to the act of 3d March, 1871, (16 Stats., 536) and on turning to that act we find that the subdivisions of the grade of Chief Engineers are not styled grades at all. On the contrary, in sec. 10 of the act, it clearly appears that "Chief Engineer" is the only "grade" there alluded to. That section provides that "the foregoing *grades* hereby established for the staff corps of the Navy, shall be filled by appointment from the highest numbers in each corps, according to seniority and that *new commissions* shall be issued to the officers so appointed, *in which commissions the titles and grades* herein established shall be inserted." What "titles and grades?" The title and grade of "Chief Engineer," &c. Not the title and grade of "Chief Engineer, with the relative rank of Commander, &c." If that were the grade meant, then whenever a Chief Engineer had served long enough to rank with a Captain he must have a new commission and lose all the time under his old one in computing his pay.

The revisers made the subdivisions into grades, and left out section 10, which had to be supplied by the correcting act of 27th Feb'y, 1877, and appears in the 2d edition, R. S. as part of sec. 1480. But, as that correction, according to the decision in Ludington's case, (15 C. Cls., 466,) relates back to the adoption of the Revised Statutes, it is clear that the court is in error in saying in the Rutherford opinion that "Chief Engineer" is not denominated in the law a "grade." And all the argument based on that supposed omission, necessarily falls.

Every title expressed in a commission is clearly, by law, called a "grade;" for the line by sec. 1362, for the staff by sec. 1480. One subdivision of such a title is by inadvertence

of the revisers called a grade in sec. 1390, but it is a subdivision which has nothing to do with pay. No subdivision, which controls pay, is expressly entitled a grade in the law. That definition is the creation of the Court of Claims. It is impracticable of application and contrary to judicial and legislative precedents.

The following quotation is made from our brief below, to show the meaning of "grade" and "rank," as used in the Statutes.

"So far as 'grade' is concerned, a careful examination shows that, with a single exception in the statutes governing the Navy, and also in those governing the Army, the word is always used in the sense of title or office. In the excepted case (Sec. 1129, R. S., referred to in Wood's Case, 15 Ct. Cls., 151, and Sec. 1390, R. S.) the word grade is used to denote relative position of officers of different corps. But in the acts now under consideration 'grade' cannot mean relative position. Its use in those acts is to fix pay, and relative position has nothing to do with pay. Officers may have the same relative position and different pay, or one may have precedence of another and draw the same pay. In the sense of relative position, therefore, the word 'grade' in these acts would be a superfluity.

"If 'grade,' therefore, means merely title or office, it remains to be considered whether in the Act of 1873 and section 1588, R. S., the word 'rank' is used synonymously with 'grade;' and if not, does 'rank' mean period or *lustrum?* The use of the disjunctive conjunction 'or' is strong evidence that both words have the same meaning. There are, moreover, many other acts of Congress in which the words are employed interchangeably. Section 1, act of February 28, 1855, (10 Stats., 616, speaks of 'offices, ranks or grades.' Section 15, act of July 16, 1862, (12 Stats., 586,) fixes the 'pay of the several ranks and grades' of line officers, designating them by their titles, as Rear-Admirals, Commodores, Captains, &c. Neither grade nor rank can here mean *lustrum*, for line officers at that time had no longevity pay. Section 1226, R. S., uses the two expressions 'highest

volunteer grade' and 'highest volunteer rank' without distinction. Section 1262, R. S., says 'rank of Brigadier-General,' and section 1263 says 'grade:' and the act of January 30, 1875, (18 Stats., 304,) speaks of the 'rank' to which officers were promoted.

"It is true that in many other acts 'rank' has a different meaning, but then it always denotes the relative position of officers with respect to other officers of the same grade, or the relative position of a grade, with respect to a grade in a different corps of the service or in another service.

"Thus section 1, act April 16, 1814, (3 Stats., 125,) gives officers of the flotilla service 'the same relative rank and authority * * as officers of the same grade are entitled to in the Navy.' Section 1, act March 3, 1835, (4 Stats., 757,) gives a Surgeon absent when others of his date are examined the same rank as the latter, provided he passes a subsequent examination. Section 7, act March 3, 1857, (11 Stats., 247,) authorizes the Secretary of the Navy to fix the rank and precedence within grades, between grades and between officers in the line of promotion and non-combatants. Section 2, act March 3, 1859, (11 Stats., 407,) fixes the rank of Engineers relatively to that of officers of the line, but says that 'commanding and executive officers of whatever grade will take precedence over all Engineer officers.' Section 1, act of July 16, 1862, (12 Stats., 583,) divides the line of the Navy 'into nine grades, taking rank according to the date of their commissions in each grade.' (R. S., Sec. 1467.) Section 13, of the same act (R. S. Sec. 1466) fixes the relative rank between officers of the Navy and those of the Army, and section 20 declares that such relative rank shall be the same for officers on the retired list as for those or the active list. Section 2, act April 21, 1864, (13 Stats., 53,) provides that the members of a board to examine officers for promotion shall be 'senior in rank' to the officer to be examined. Section 7 of the same act declares that the pay of (grades of) retired staff officers shall be the same as that of the (grades of) retired officers of the line with whom they have a relative rank. Section 1, act January 24, 1865, (13 Stats., 424, R. S., Sec. 1506,) provides that officers may be advanced 'thirty numbers in rank,' section 9, act July 16, 1862, (12 Stats., 584, R. S., Sec. 1508,) having allowed

line officers to be advanced one grade on receiving the thanks of Congress. In section 1262, R. S. above quoted, the work rank is used twice, once to denote grade and once to signify relative position. Sections 1474 and 1475, R. S., fix the relative rank of officers of the Medical and Pay Corps with those of the line. The act March 3, 1881, (Sup. to R. S., p. 614,) directs that Section 1486, R. S., shall not be construed as giving a staff officer precedence in his corps over or higher relative rank than another officer holding a prior commission.

"Nowhere in all of these statutes does the word rank signify the period or *lustrum* by which pay is governed. It is true that section 2 of the act of March 3, 1859, above quoted, fixes the relative rank of Chief Engineers according to their length of service in that grade, and section 1 of the act of July 2, 1864, (13 Stats., 373, R. S., 1491,) makes the assimilated rank which the President may give warrant officers depend on the same thing; but it is to be remarked that both of these enactments fix a period of service which in no way coincides with the periods fixed by the acts of March 3, 1849, (10 Stats., 378,) and section 1 of the act of June 1, 1860, (12 Stats., 26,) by which the longevity pay of these officers was to be determined. It seems clear, if long and uniform prior usage throws any light on the subject, that the word rank, as used in the acts under consideration, does not mean *lustrum* or period. It must, therefore, be used synonymously with grade, which is the only signification in which, as used in the statute, governing the Navy, it has any relation to pay."

One more act may be cited, showing clearly the relation between "grade" and "*lustrum*," viz. sec. 1 of the naval appropriation act of March 3, 1883, which provides (22 Stats., 473) that "all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects, in the same manner as if all said service had been continuous and in the regular Navy *in the lowest grade*

having graduated pay held by such officer since last entering the service."

The pay of a "grade" is "graduated" within the grade by *lustra* of service. But the *lustrum* is not the grade.

II.

The court below say in the Thornley opinion that longevity pay is confined to the active list, because section 3 of the act of July, 1870, and sec. 1556, R. S., fix the pay only of officers "on the active list." That argument would apply to the whole pay table, of which longevity is only an incident, and exclude retired officers from any pay whatever. So it would apply to sections 1261 and 1274, and exclude retired Army officers from all pay. In the Navy, as in the Army, the only pay fixed in dollars is the pay of the active list. In the Navy, as in the Army, the pay of certain grades is increased every five years up to a certain limit—in the former by a fixed amount, according to length of service in the grade; in the latter by a *percentum* based on the whole service. In both branches retired pay is ascertained by calculating seventy-five *percentum* of active pay. How does it happen that in the Army seventy-five *percentum* of a graduated pay is a graduated pay, while in the Navy seventy-five *percentum* of a graduated pay is a fixed sum?

III.

The policy of the law is relied on to produce that effect.

The court below say, in the Thornley opinion, that the whole basis of longevity pay is "the officer's capacity for duty" (increased by experience) "and his performance of it." Before deciding a case on this theory, the court should have seen if it was not in conflict with judicial decisions and plain acts of legislation.

We claim that it is in serious conflict with both. Can there be one policy of the law for the Army and another for the Navy? It would seem not. Yet that would be the result of affirming this decision. When the decision in the Tyler case was made known in Congress it was sought to change the law for the future, and an amendment to that effect passed the House in the Army appropriation bill of 1882, but it did not prevail in the Senate, and the law was not changed.

See Cong. Record, Vol. 13, part 3, pp. 2580, 2581.
Army Act of June 30, 1882, 22 Stats., 118.

Wherever the question of longevity pay has squarely come up in Congress, no discrimination has been made against the retired list. Thus, by sec. 9 of act of March 2, 1867 (14 Stats., 423), it was provided "that officers on the retired list of the Army shall have the same allowance of additional rations for every five years of service as officers in active service."

The first steps toward a retired list for the Navy are found in sec. 8, act March 2, 1799 (1 Stats., 716), and sec. 8, act April 23, 1800 (2 Stats., 53), which provide that officers disabled in service shall receive not more than "half of their monthly pay." Longevity pay was first granted to Surgeons by sec. 1 of the act of March 3, 1835, when the act of 1800 was still in force. If, therefore, a Surgeon of four years had become disabled in the line of duty after the passage of the act of 1835, he might have claimed an advance of pay on the expiration of his fifth year under the act of 1800.

The act of February 28, 1855 (10 Stats., 616), which first established a retired list, properly speaking, confined it to line officers, and as they had no longevity pay on the active list, naturally none was provided for the retired list. The act of February 21, 1861, however, under which the appell-

ant was retired, and which was the first law allowing the retirement of Surgeons, clearly established longevity pay on the retired list, as it gave them leave-of-absence pay, which was, as we have seen, a pay gradually increasing according to length of service.

So sec. 2, act July 28, 1866 (14 Stats., 345), fixed the retired pay of certain officers at "one-half of the pay to which such officers would be entitled if on duty at sea." Suppose that one of these officers "would be entitled," July 30, 1866, to $2,000 *per annum* if he were on duty at sea, and August, 1866, to $2,200, because of the expiration of his first five years, would he not as a retired officer be entitled to $1,000 *per annum* July 30, 1866, and to $1,100 *per annum* August 1, 1866?

As we have above shown, the time spent by an officer in enforced inaction on the retired list, will surely count for him when he is called into active service. But on the retired list he could have acquired no increased capacity for service by reason of experience; and to further test the theory of the court, let us inquire what increased capacity for duty does an officer acquire while on leave of absence, or on furlough? But all the time so spent counts in computing his pay, under Sections 1556 and 1557, R. S.

What increased capacity does an army officer acquire by having served in the navy? But that time counts for him under the act of February 24, 1881, (21 Stats. 346;) so the time which a naval officer has spent in the army, and regular or volunteer, as officer or enlisted man, counts for him in the navy, under the act of March 3, 1883, above cited, although he may have to unlearn on water everything he has learned on land.

And if time spent as above may be counted for longevity pay, why not time passed on the retired list? The retired officer, though not on active duty, is still in ser-

vice. Under Section 1459, R. S., he is borne on the Navy Register, subject to the navy regulations, and to trial by court martial, and is entitled to wear the uniform of his "grade;" and under Section 1462 he may be put on duty in time of war.

There is, indeed, a limitation on the increase of a retired officer's pay. Section 1461, entitled him to promotion, as his date on the active list is promoted. This was justly regarded as a mere honor. So Section 1591 provided "that no officer, heretofore or hereafter promoted upon the retired list, shall, *in consequence of such promotion*, be entitled to any increase of pay." But this impliedly admits, rather than excludes, the right to increase of pay by reason of age.

In our opinion, age alone, with its attended increased expense, is the controlling reason for longevity pay. It is to the interest of the republic that its officers should be citizens with families, and that a comfortable provision should be made for the expenses increasing with their years, whether they are spent in active service with active pay, or on the retired list, with diminished pay until needed in time of war; and all the more reason is there why this policy should be applied to the retired list, when it is remembered that the physical disabilities incurred in service, which place the officer on that list, are calculated to augment rather than reduce his expenses. But the decision of the lower court distinguishes between years of service in health and on full pay, and years of suffering from injuries received in service. The former increase an officer's pay, the latter do not.

Is this not a declaration of policy ruinous to the *morale* of the service? An officer is told that if he rushes into danger in his first five years, and receives wounds necessitating his retirement, he can never get more than three-fourths of the pay of that first lustrum, no matter how

Exactly the same construction was sought to be put upon sec. 1274 in Tyler's case, by leaving out the words "of the rank," and making the section read, "officers retired from active service shall receive seventy-five *percentum* of the pay * * * * * upon which they were retired."

The Court of Claims then said:

"We are unable to concur in such a construction. It is in conflict with the obvious and grammatical connection of the language of the section, and is not in accord with the manifest purpose for which the words 'upon which they were retired' were added. Those words plainly qualify the word 'rank' immediately preceding them, and thus specifically define the rank, and nothing more, which shall control, for the time being, the pay of retired officers."

But in these cases the construction there repudiated is concurred in, as "not strictly grammatical, but leading to no preposterous results."

V.

We now come to the fourth proposition enumerated in our statement of the case, viz: That if "grade or rank" be conceded to mean lustrum or "pay grade," then "the grade or rank *held by appellant at the time of his retirement*" was, under the act of August 3, 1848, and the act of February 21, 1861, the grade or rank of a surgeon after twenty years. This proposition, like the foregoing, would give appellant $3,150 *per annum*, since March 3, 1873. If the facts warrant judgment on this ground, it is of course of no importance that it is not set out in the petition in the court below.

We submit this point without argument, as this brief has already stretched to a great length. For this our only excuse is to be found in the manifold errors latent in the opinions of the lower court, to discover all of which considerable study and a comprehensive view of the whole subject are necessary.

Respectfully submitted,

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Counsel for Appellant.

113-310

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In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THORNLEY
v.
THE UNITED STATES. } No. 1215.

BRIEF FOR THE UNITED STATES.

This case is submitted upon the reasoning in the opinion of the learned court below (Record pp. 5 &c.).

For the convenience of the court sections 1556 and 1588, Revise Statutes, are here printed, these being referred to by the learned court below (pp. 7 and 8) by their original titles as acts of 1870 and 1873.

> SEC. 1556. The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the Navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations. The Admiral, thirteen thousand dollars. * * * surgeons, paymasters, and chief engineers, who have the same rank with paymasters, during the first five years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave or waiting or-

ders, two thousand dollars; during the second five years after such date, when at sea, three thousand two hundred dollars; on shore duty, two thousand eight hundred dollars; on leave or waiting orders, two thousand four hundred dollars; during the third five years after such date, when at sea, three thousand five hundred dollars; on shore duty, three thousand two hundred dollars; on leave or waiting orders, two thousand six hundred dollars; during the fourth five years after such date, when at sea, three thousand seven hundred dollars; on shore duty, three thousand six hundred dollars; on leave or waiting orders, two thousand eight hundred dollars; after twenty years from such date, when at sea, four thousand two hundred dollars; on shore duty, four thousand dollars; on leave or waiting orders, three thousand dollars.

* * * * *

SEC. 1588. The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement.

S. F. PHILLIPS,
Solicitor-General.